



CBeyond COMMUNICATIONS

**320 Interstate N. Parkway, SE, Suite 300
Atlanta, GA 30339
Phone: 678-424-2400 / Fax: 678-424-2500**

December 16, 2002

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Communication in CC Docket Nos. 01-338, 96-98, 98-147, 01-318, 01-321

Dear Ms. Dortch:

In this letter, Cbeyond Communications provides further information for the Commission's consideration in the above captioned proceedings concerning access to enhanced extended loop combinations or "EELs".¹

Benefit of EELs

There is no question that the ability of competitive local exchange carriers ("CLECs") to access EELs has resulted in a more robust, competitive facilities-based local exchange market. As the Commission is well aware, Cbeyond provides service to its customers utilizing DS1 level loops and also by utilizing DS1 level EELs.² Access to EELs³ has enabled Cbeyond to reach small business customers that otherwise may not have had a facilities-based competitive alternative. It is without question that these small businesses located outside of the core metro areas have benefited from having a

¹ An enhanced extended link ("EEL") is a combination of network elements comprised of a loop, transport and, when required, multiplexing.

² Cbeyond currently provides telecommunications services, including local services, provisioned over DS1 level EELs in Atlanta, Dallas and Denver. Such EELs are provided as either DS1 loops combined with DS1 interoffice transport or DS1 loops combined with 3/1 multiplexing and DS3 level transport.

³ In all three markets, Cbeyond has, except in a limited circumstance, purchased new EELs and has not had to first order as special access and then convert under the FCC's rules adopted in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98, 15 FCC Rcd 9587, 9598 (2000) ("*Supplemental Order Clarification*").

competitive alternative. Therefore, the rules must be clarified to, without question, permit CLECs continued access to new EELs.⁴

The incumbent local exchange carriers ("ILECs") have once again in this proceeding raised their same tired arguments with regard to the erosion of special access revenues and the harm that permissive access to new EELs will ostensibly bring upon their companies. From Cbeyond's perspective this is yet another attempt by the ILECs to thwart the progress made toward a competitive local exchange market and to protect monopoly revenue to which the ILEC is no longer entitled. Even under the assumption that there may be some validity to the ILEC argument, the facts do not support their hysteria.

Cbeyond entered the local exchange market in Atlanta in early 2001 and Dallas in mid 2001. In both markets, Cbeyond has had access to new EELs on an unrestricted basis since market entry and has effectively used EELs to expand our market footprint to reach customers not served out of offices where we are collocated.⁵ Based on what has - or rather has not - occurred in the Dallas and Atlanta markets where EELs have been made available on an unrestricted basis for some time, the ILECs' claims are unfounded and not supported by the record in this proceeding. In fact, there has not been widespread misuse of unrestricted EELs in either of these markets; rather EELs have been used by CLECs in the way envisioned - as an entry method to provide a competitive alternative in the local exchange market. Thus, it is Cbeyond's position that the need for use restrictions on new EELs, which represents new revenue for the ILECs (well over 95% of our current customer base--nearly 5000 installed customers--had narrowband access and did not have a T-1 at their location) and not displacement of existing wholesale revenue, is in no way required from a legal, policy or practical perspective. However, to the extent the Commission does move toward some form of requirements to qualify for access to new EELs, Cbeyond submits the following recommendations for consideration.

**The Current Test Adopted for Conversion of Special Access Circuits to EELs
Is No Longer Appropriate and Should Not Apply to New EELs⁶**

The use restrictions adopted in the FCC's *Supplemental Order Clarification* are not appropriate for several reasons. First and foremost, it is important that any restrictions or requirements be neutral to technology. The use restrictions adopted are not technology neutral and because of that must now be abandoned. Specifically, options 2 and 3 which require certain threshold measurements to be met to qualify the circuit for conversion assume a circuit-switched network and channelization. Clearly technology has now moved beyond only circuit switching for the provision of local exchange

⁴ Obviously, there may continue to be circumstances where conversions of special access to EELs may still be required as contemplated by the FCC in its previous rulings, however, the focus of this letter is the ability to access EELs without having to go through such a conversion process.

⁵ In offices where Cbeyond is collocated, DS1 unbundled loops are purchased from the ILEC.

⁶ *Supplemental Order Clarification*, 15 FCC Rcd at 9598.

service⁷ and so too should any requirements to qualify for EELs. No longer do minutes of use move across our network and no longer is channelization of a DS1 required to provide voice and data over the same circuit. The Act provided the incentive for facilities-based CLECs to innovate and to create greater network efficiencies in order to compete more effectively and bring greater value to customers in the local exchange market. This has resulted in Cbeyond's services being delivered utilizing dynamic bandwidth allocation of the DS1 (instead of channelization) and the processing of all services, including voice, as packets instead of minutes.⁸ Traditional circuit-switched voice providers use channelized DS1 technology and will typically use one channel or a fixed 64kb of bandwidth per voice call. By contrast, Cbeyond uses packetized IP technology where the same voice phone call takes up to 80kb of bandwidth including signaling overhead and payload. Because the bandwidth used is dynamic, not fixed, whatever bandwidth is not being used for voice calls will be available for data. Voice calls always take priority over data. Much progress has recently been made to shrink even further the bandwidth needed to support a voice call. Through the use of signaling and payload compression, Cbeyond will now be able to reduce its bandwidth requirements for a voice call from the approximately 80kb required today to around 15kb. Because of technological advancement, specifically in the area of voice compression, usage measures in any form are becoming even more obsolete. The technology for providing voice compression is in use today and Cbeyond is currently working toward implementation of it in our network.

CLECs like Cbeyond should not be penalized for such innovation. The current use restrictions, while achievable in some circumstances,⁹ may place a greater burden on Cbeyond than other CLECs in an audit environment. Such requirements, if adopted for new EELs, could also competitively disadvantage a CLEC utilizing newer packet-based switching. Thus, any requirements, if adopted, should seek to minimize the burden placed on carriers, seek to be technologically agnostic and should acknowledge the changing technological environment in which we operate and provide local service.

Last, the sole provider test currently in place presents its own unique problems for CLECs. On its face, this test would seem to have some validity. However, the issue is that while the CLEC might be the sole provider at the time the circuit is converted or ordered, there is no assurance that the end user customer might not make changes after the fact, of which a CLEC would have no knowledge. Indeed, many customers find a redundancy value (reliability assurance and competitive pressure) in having more than one telecommunications provider. Yet, this type of requirement could place requirements on the end user customer, in addition to the CLEC, that could potentially constrain the

⁷ Cbeyond provides clear evidence of this in the fact that the network infrastructure developed and in use today in the provision of telecommunications service to its retail customers is packet based.

⁸ The underlying network architecture of Cbeyond's network is progressive and different. However, to the end user and the ILEC, the difference is not transparent. When a customer places a local call or Cbeyond exchanges local traffic with an ILEC, the call and exchange it is no different from a circuit switched call. The efficiencies and differences are internal to the Cbeyond network.

⁹ Any use restriction test should take into account that a carrier may have all of an end user's traffic and still not meet certain measurement thresholds set for local traffic.

customer's freedom to manage its business and telecommunications service needs. The current test, if interpreted to require continual policing, could force consumers to forego that freedom in exchange for lower rates from a sole provider that is able to give those lower rates (or perhaps any service at all) only in exchange for assurance that the customer will choose a sole provider for the duration of the service agreement. It is beyond comprehension that the FCC would want that outcome.

If a Test is Deemed to be Necessary, A "Bright Line" Test is More Appropriate and Less Burdensome to All Parties

It must be recognized that the most important aspect of any test would be to ensure that CLECs who are providers of local service in addition to broadband services are not precluded from using EELs. With that as a baseline, it seems reasonable that the bright line test endorsed by ALTS would achieve that end.¹⁰ However if the Commission determines that it must go further, Cbeyond offers the following additional criteria that could be offered as indicia that the CLEC is not using EELs exclusively for interexchange traffic and is instead using the EEL to provide local service in addition to broadband services in direct competition with the ILEC.

Service Indicator: CLEC provides local voice service to its customers.

Evidence to Support: Local tariffs filed; Certificate of Authority to Provide Local Service; and/or Customer contracts demonstrating that local service is provided.

Network Infrastructure Indicator: The EEL circuit terminates into a physical collocation pursuant to a Section 251 Interconnection Agreement.

Evidence to Support: Circuit facility assignment (CFA) on the order.

Interconnection Indicator: Interconnection service in place for the exchange of local voice traffic pursuant to a Section 251 Interconnection Agreement.

Evidence to Support: Local interconnection trunks in place.

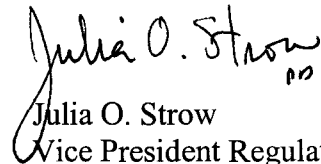
Any of the above criteria when coupled with the ALTS test would provide a reasonable and clear presumption that the CLEC is using the EEL to provide local service and is not using the EEL purely for interexchange service. This on its face should satisfy the concerns raised by the ILECs. To the extent the above criteria do not address all circumstances that might arise in the future, the Commission should adopt a waiver option as was included in the *Supplemental Order Clarification*.¹¹ Such a waiver, if

¹⁰ Letter to William F. Maher, Chief, Wireline Competition Bureau from Jonathan Askin, General Counsel, Association for Local Telecommunications Services, WCB Docket No. 01-338, filed November 14, 2002. ALTS recommends that use restrictions be eliminated or recast to prohibit conversions of circuits used by carriers that are exclusively IXC's or to prohibit conversions of circuits that are connected to switching equipment used exclusively to provide long distance voice services or that are used exclusively to serve a customer for which the requesting carrier provides no local or broadband services.

¹¹ *Supplemental Order Clarification*, para. 23.

requested, should be addressed on an expedited basis to ensure that a CLEC is not discriminated against in the market.

Sincerely,

A handwritten signature in black ink that reads "Julia O. Strow". The signature is fluid and cursive, with a small "ps" written below the name.

Julia O. Strow
Vice President Regulatory
& Legislative Affairs
Cbeyond Communications
320 Interstate North Parkway, SE
Suite 300
Atlanta, GA 30339
(678) 424-2429 (Telephone)
(678) 424-2500 (Facsimile)

cc: Christopher Libertelli
Matthew Brill
Jordan Goldstein
Dan Gonzalez
William Maher
Jeffrey Carlisle
Carol Matthey
Scott Bergmann
Jessica Rosenworcel
Thomas Navin
Robert Tanner
Jeremy Miller
Julie Veach
Daniel Shiman